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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 431

IRVING E. MORRIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 1, pp. 31–41) is reported at 225 F. 2d 91.

JURISDICTION

The judgment of the Court of Appeals was entered July 28, 1955. A petition for rehearing was denied August 30, 1955. The petition for a writ of certiorari was filed September 29, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether the trial judge invaded the province of the jury in explaining to the jury his rulings on the admissibility of declarations of a co-conspirator.

2. Whether the court's statement on the *voir dire* that it would be compelled to direct a verdict of acquittal if the evidence did not establish a prima facie case, considered together with its action in not directing a verdict, deprived petitioner of a fair trial.

3. Whether the judge's statement on the *voir dire* that the defendant had a right of appeal, and the government did not, constituted reversible error, where he later instructed the jurors to ignore the factor of appeal in reaching their verdict.

STATEMENT

Petitioner and "Dixie" Richmond were indicted on three counts, counts one and two for possession of counterfeit notes, and count three for engaging in a conspiracy to possess and sell counterfeit notes (R. 3–8). Richmond entered a guilty plea and received a sentence of 10 years imprisonment (See C. A. Op., Pet. App. 1, p. 31). A jury found petitioner guilty on the conspiracy count (R. 362) and he received a sentence of five years imprisonment (R. 363).[1] On appeal, the conviction was affirmed (Pet. App. 1, pp. 31–41).

[1] Two previous trials on the same indictment ended in jury disagreements. (See C. A. Op., Pet. App. 1, p. 31.)

On the *voir dire* examination of the jurors, the court explained that they were the judges and he was in effect a legal advisor who would decide what evidence they should hear and tell them what principles of law to apply. In emphasizing that they should rely upon his decisions as to the admissibility of evidence, he pointed out that his mistakes should not concern them since the defendant could bring the question before a higher court. He noted that the government did not have this right of appeal. (R. 12–13.) Upon suggestion by counsel that the prospective jurors might have acquired the wrong idea from mention of the fact that the defendant could appeal, the court promised to straighten out any such possible impression (R. 14–15). This he did in the following language (R. 16):

> The COURT: I think in asking some questions I mentioned the fact that your decision would be final, so far as the defendant is concerned, if he were found not guilty, that the Government has no right of appeal; but that the defendant had a right of appeal. I mentioned that by no means to indicate that you should in any way slight your duty, but rather that you should consider your duty more seriously in all respects because of the fact that in a civil case both sides have the right of appeal and your decision is not so near final as it is here. Your responsibility is greater, and you should most certainly not assume,

"Well, we'll reach a decision on this; if it is not right the court will set it aside or the defendant can appeal."

I mention it to impress upon you the seriousness, that in all likelihood your decision, in all likelihood—there are some times appeals are granted—but in all likelihood if you find the defendant, if you should find the defendant guilty, in all likelihood and almost I would say nine chances out of ten or more, that will be the final verdict. I want you to know that in all likelihood your verdict is going to be final, so you should give every consideration before you render a verdict, and ignore the fact that one side can't appeal and think that maybe you can render a decision and the other side can appeal.

I assure you, I have never yet been reversed in a criminal case; I have in a good many civil cases. I will try my best to see that this case is tried fairly. So the chances are, again I say to you, that your verdict is likely to be final. So you must take it seriously and realize that if you find this man guilty he is likely to remain found guilty.

The government's evidence of the conspiracy and petitioner's part in it may be summarized as follows:

Richter, who appeared for the government, testified that he overheard a conversation between petitioner, Aldrich, and Dixie Richmond, the alleged co-conspirator, in which petitioner told

Aldrich he had some counterfeit bills and asked if he knew of someone who wanted to buy them, or if he wanted to handle them himself (R. 25–26). Aldrich indicated he did not want to be involved (R. 25). Richter further testified that he was introduced to petitioner by Aldrich at a bar in Los Angeles (R. 24) at which time Aldrich told petitioner that Richter was the man who was going to take the counterfeit money (R. 24) and petitioner reminded Aldrich that the counterfeit money had to be dealt in in $50,000 bundles (R. 24).

Richter identified a counterfeit bill received by him through the mails in Los Angeles on April 15, 1949 and stated that he took it to agent Carli of the United States Secret Service (R. 27–29). He and Carli exchanged some phone calls with Richmond then in Chicago (R. 29). The telephone number used by Richmond was that of a telephone located in a Chicago tavern owned by petitioner (R. 107).

Richter and Carli met Richmond in Chicago (R. 31). On May 2, 1949, Richter saw petitioner emerging from a restaurant in which Richmond and Carli were having coffee (R. 30–31). Carli noticed petitioner observing him at the restaurant (R. 194). On the night of May 2, Richter entered a cab with Richmond and noticed that petitioner followed them in his car while he and Richmond stopped twice first to pick up a bag of counterfeit money and then to check it in a public locker (R.

33–40). The cab returned to Richter's hotel at which time Richmond got out and spoke to petitioner (R. 42). The cab then drove off with Richter and Richmond, and shortly thereafter the cab was stopped and Richmond was arrested (R. 43). Petitioner, who had continued to follow the cab, then attempted to pass the cab, but his car also was stopped and petitioner was arrested (R. 44).

The above foundational evidence of a conspiracy and petitioner's part in it having been presented, Carli and Richter were allowed to testify to their conversations with Richmond, the alleged co-conspirator (R. 195–209, 233–247). This testimony was to the effect that in Los Angeles Richmond told Richter that he, Richmond, would deal with him with respect to the counterfeit notes; that Richmond called Richter from Chicago to say he was sending a sample (R. 241–243); and that thereafter details were arranged for the sale of the notes to Carli, posing as Richter's contact (R. 195–209, 246). The only mention of petitioner in these conversations was to the effect that Richter stated that, on the night of May 2, after he and Richmond had checked the money, he suggested to Richmond that they take another cab because he had seen petitioner talk with the cab driver (R. 247).

When Richter first testified, and said that he had a conversation with Richmond, the judge

sustained an objection to any testimony as to the contents of the conversation (R. 27). He explained his action to the jury as follows (R. 27);

> The COURT: The jury will understand that no person can be bound by statements of another person out of his presence, where he had nothing to do with it, unless there is first evidence presented that some kind of an agency existed. For instance, if a man has hired somebody to do something, or a conspiracy, or some evidence to show that there would be some authority, that he would have some right to speak, or that they were engaged in the same type of conspiracy.

Subsequently, after the judge had excluded testimony as to a conversation between Carli and Richter on the ground that they were not conspirators, he said (R. 191):

> The COURT: I know the jury may be confused about refusing sometimes to let conversations go into the record, and that sometimes I do. We have had that out now, conversations between certain persons where sufficient evidence has been shown to show some form of agency, you will be permitted to hear that, but there is no charge of any agency or anything like that or conspiracy between that particular man Richter and the defendant. So you can't

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> bind somebody with a conversation with somebody where there isn't any relationship established. You couldn't bind them with a conversation between me and them in this case, for instance, unless you show I had some agency relationship.

When Richter was recalled to testify to his conversations with Richmond, the court, in overruling defense counsel's objection, stated (R. 235):

> The COURT: It is understood that the right was reserved to recall this witness specifically for such questions and answers, and counsel has now made an objection to each and every question and answer, to the asking of each and every question, and to the answer thereto, on the grounds as set forth.
>
> The court overrules the objection, the court having heretofore ruled on a similar objection in the same manner, for the reason that there has been tendered certain evidence that the jury might, has a right to take into consideration, and that it is for the jury to decide whether the other evidence amounts to, sufficient to consider whether there has or has not been a conspiracy proved.
>
> With that evidence already in the record it is up to the jury to believe or not believe the evidence that has been presented.

After further argument outside the presence of the jury (R. 236–238), the judge addressed the jury as follows (R. 239):

> The COURT: Ladies and gentlemen of the jury, the questions which you will hear, and the answers thereto, have been objected to, and the objections have been overruled. You will hear the questions and the answers, and they will be binding upon the defendant as to count 3. * * *
>
> The third count is that he did conspire with this man Richmond. The court has ruled that these conversations may be heard and shall apply to and be evidence in connection with count 3 only. With that in mind you may proceed.[2]

On the suggestion of defense counsel that "admissible" was a better word than "binding" the court agreed, stating (R. 239–240):

> The COURT: They may be admitted. It is for you to determine, of course, whether they are binding or not. It isn't for the court to determine, but they may apply, or be admitted, is a better term—I do not mean and I do not want you to understand—I do not mean by any reason say that they are binding. That is for you to decide whether they are binding or not.
>
> They will be binding if you find they were made, but you will be the persons to find whether they were actually made or not. That will be the point. * * *

In overruling another objection, the court said (R. 243):

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[2] The judge subsequently ruled that the evidence was admissible on other counts as well (R. 342).

> The COURT: Objection overruled. It is for the jury to determine the whole conversation, whether or not it took place and whether or not it applied to the defendant Morris.
>
> There has been evidence presented and it is up to the jury to believe whether or not there was a conspiracy existing between Richmond and the defendant.
>
> You heard the testimony. It is up to you to believe it and, of course, in order for you to get the story you must hear all the conversation that Richmond has had concerning anything relating to this particular act.

In his final charge, the judge included the following instruction relative to declarations of a co-conspirator (R. 355):

> During the course of the trial, declarations, statements and conversations of one of the defendants, made out of the presence of the other defendant, have been admitted in evidence. The court charges you that the declarations, statements and conversations of one defendant, made out of the presence of the other defandant, is not binding upon such other defendant unless such other defendant is shown by the evidence beyond a reasonable doubt to have been a participant in the conspiracy charged in this indictment and unless, further, the declaration, statements or conversations were in furtherance of the alleged joint enterprise and made during its continuance.

ARGUMENT

This case presents no question of law of importance nor any conflict of decisions. The court below correctly affirmed the conviction of petitioner.

1. Petitioner contends (Br. 9–24) that the judge's comments to the jury with respect to the admissibility of co-conspirator Richmond's conversations with the government witnesses in effect directed the jury to find petitioner guilty of conspiracy. The judge, of course, before admitting such evidence, had to make a preliminary ruling to the effect that there was sufficient evidence of a conspiracy to justify the admission of declarations made in the course thereof. It was proper for the judge to indicate to the jury the reasons for his rulings on the admissibility or exclusion of evidence, so as to avoid misunderstandings. Not every such incidental comment by the court was a complete and exact statement of the law on the subject. But as we argue in more detail below, his remarks, when considered in context, could not have misled the jury. And in his final instructions, the judge gave full and correct instructions not only on the consideration to be given to declarations of a co-conspirator (R. 355), but on reasonable doubt (R. 348–349), the presumption of innocence (R. 351), the necessity for proof of agreement beyond mere knowledge of illegal acts (R. 353–354), and the weight

to be given to circumstantial evidence (R. 355–356). It thus becomes evident that petitioner's attempt to pick apart incidental remarks of the trial court in ruling on the admissibility of evidence is an attempt to magnify on appeal instances which were of little importance in their trial setting. See *Glasser* v. *United States,* 315 U. S. 60, 83.[3]

Petitioner argues (Pet. 9–10) that the judge's remark at R. 27 (quoted at p. 7, *supra*) was incorrect in that the judge said that before a man could be bound by statements outside his presence there would have to be some kind of agency, or evidence "that they were engaged in the same type of conspiracy." This last remark, admittedly inaccurate, was made early in the trial when the judge was excluding, not admitting, evidence. It was not objected to at the time. Similarly the remark at R. 191, quoted *supra,* pp. 7–8, which petitioner asserts was a ruling that sufficient evidence of conspiracy had been shown (Pet. 11), was actually a ruling that the evidence was inadmissible because the person making it was not charged as a co-conspirator. This remark too was not objected to at the time.

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[3] These incidental remarks by the trial judge cannot be compared to the erroneous cursory instruction given to the jury in *Bollenbach* v. *United States*, 326 U. S. 607, after it had reported itself hopelessly deadlocked, or to the lack of proper final instructions in *Nicola* v. *United States*, 72 F. 2d 780 (C. A. 3) (see Pet. 21).

When the judge did finally admit testimony of conversations with co-conspirator Richmond, he prefaced his ruling with the statement that "there has been tendered certain evidence that the jury might, has a right to take into consideration, that it is for the jury to decide whether the other evidence amounts to, sufficient to consider whether there has or has not been a conspiracy proved" (R. 235). Thereafter he made the remarks at R. 239, quoted *supra,* pp. 8–9, saying that the statements were binding upon petitioner, if the jury believed them to have been made. (At the suggestion of counsel, the judge promptly corrected himself to say that the statements would be "admitted" against petitioner.) Petitioner complains (Pet. 12–22) that at this point the judge did not make it clear that the remarks would be admissible against petitioner only if there were proof that petitioner was a conspirator and if the remarks were made in the course of the conspiracy and in furtherance thereof. But, as noted, the judge had just said that the evidence was admissible because there was evidence from which the jury could find a conspiracy (R. 235). And very shortly thereafter, at R. 243, quoted *supra,* pp. 9–10, the judge again made it clear that it was for the jury first to determine whether there was a conspiracy between Richmond and petitioner. And finally, there is the fact that, when the case was submitted to the jury, the charge on the admissibility of the declarations

(R. 355), as petitioner concedes (Pet. 19), correctly covered all aspects of the question.[4]

The whole issue with respect to the admission of the declarations of a co-conspirator has, in relation to the facts of this case, none of the significance which petitioner would attach to it. The declarations to which the witnesses testified did not mention petitioner at all except for the fact, otherwise proved, that petitioner followed Richmond and the government agents on the night of September 2. What the declarations tended to show was the arrangements for and the passing of the counterfeit money, *i. e.*, that the substantive offenses had occurred. Petitioner was, however, acquitted of the substantive offenses.

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[4] Although admitting that the judge's final instructions were correct (Pet. 19), petitioner asserts that there is a conflict in the federal courts as to the function of judge and jury in relation to such evidence which this Court should resolve. There is no conflict on the issue here involved. The instructions here meet in full the requirements of *Glasser* v. *United States*, 315 U. S. 60, 73–74.

In *United States* v. *Dennis*, 183 F. 2d 201, 230–231 (C. A. 2), cited by petitioner (Pet. 20–21), Judge Hand suggested that an instruction that declarations of co-conspirators could not be considered against a defendant for any purpose until there was proof of his participation in a conspiracy was too favorable to a defendant since the declarations might establish the existence of a conspiracy, whether or not a particular defendant was shown to be part of such conspiracy. No such issue is presented here since the instructions (R. 355) required the jury to find that a conspiracy existed before considering against petitioner declarations of co-conspirator Richmond.

2. The fact that the court failed to direct a verdict of not guilty at the close of the case did not lead the jury to infer that the government had proved its case beyond a reasonable doubt because of language used by the court in its *voir dire* examination of the jurors. To refute petitioner's argument (Pet. 25–26), we need only cite in full the comment of the court (R. 13–14) from which petitioner urges such inference to have arisen:

> The COURT: The responsibility is on the Government to find him guilty,[5] and if the evidence does not show him guilty beyond a reasonable doubt then they would find the defendant not guilty. That is the proper question, because the defendant is under no obligation to testify or to present any evidence of not being guilty. He has a right to present evidence to contradict evidence that is in, but he is under no obligation to prove himself not guilty. The Government must make a prima facie case at least, must show beyond a reasonable doubt that he is guilty, because if there was not evidence that the court considered prima facie case I would be compelled to direct a verdict.
>
> At this time I think it is proper for me to ask this question: Are each of you willing to abide the instructions of the court, even

[5] The slip of the tongue by which the judge said "find" instead of "prove" certainly could not, as petitioner argues (Pet. 25), have been misleading.

though it might so far as to direct a verdict, if I should find that there is an absence of testimony, an utter absence of sufficient testimony to find the defendant guilty? Under those circumstances it might become my duty to direct you to return a verdict of not guilty. Would each of you do so, if I should so direct? Would each of you so do? And would each of you so do?

In a criminal case I don't believe there would be a case where I would have authority to direct a jury to return a verdict of guilty. I believe the question of guilt would still be a question of fact for the jury to decide. It is only in the absence of proof where I would have the authority to direct a verdict.

The most that can be inferred from such language and the failure to direct a verdict is that the government had presented a prima facie case. That is always the situation when a judge overrules a motion for acquittal. If it constitutes a comment on the evidence at all, it falls within the area of permissible comment. Cf. *Quercia* v. *United States,* 289 U. S. 466, 470. Here the judge, throughout the trial, made it clear that the issues of fact were for the jury to decide (see, e. g., R. 243, 343) and in submitting the case to the jury gave full instructions on all aspects of the case. The fact that petitioner was acquitted on two counts submitted to the jury fur-

ther demonstrates the insubstantiality of petitioner's contention.

3. Petitioner's argument (Pet. 27–29) that the comment of the judge on the *voir dire* examination of the jurors (R. 13) that any mistakes he made in ruling on the admissibility of the evidence could be appealed by the defendant deprived him of a fair trial is equally insubstantial. After defense counsel questioned the possible effect of this statement on the jury (R. 14–15), the court sought to impress on the jurors the seriousness of their decision, the fact that in all probability their verdict would be final, and that they should not be influenced by the fact that one side can't appeal. As noted by the Court of Appeals (C. A. Op., Pet. App. 1, p. 40), this further statement apparently satisfied seasoned defense counsel who recorded no further objection.

A similar situation arose in *United States* v. *Martel*, 104 F. Supp. 140, 144 (E. D. Pa.), reversed on other grounds, 199 F. 2d 670 (C. A. 3), when the court in instructing the jury said that if it were in error as to the law it could be corrected by another court. The court noted in overruling a motion to set aside a verdict:

> Jurors are well aware of the existence of federal appellate courts even in the absence of a specific allusion to them by the Court. The average layman tends to be very conscious of the right of appeal from an

adverse determination in a court of first instance.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

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[6] Two of the state cases cited by petitioner to the contrary (Pet. 29) involved more aggravating conditions. In *Holt* v. *State*, 2 Ga. App. 383, 58 S. E. 511, the court made a forceful statement in the midst of cross examination by defense counsel: "I may be wrong about this. You have your remedy. You can go to the Supreme Court." In *Postell* v. *Commonwealth*, 174 Ky. 272, 283–284, 192 S. W. 39, 44, the court told the jury that a prisoner under life sentence would be subject to parole in answer to their query while they were considering the case, and after which response they returned a death sentence. Just how the comment in the other state case cited by petitioner, *People* v. *Silverman*, 252 App. Div. 149, 174, 297 N. Y. S. 449, 476, arose is not clear from the report of the case.

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PETITIONER'S REPLY TO BRIEF OF UNITED STATES.

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